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IN THE

Supreme Court of the United States

October Term, 1992

JOSEPH SHIROKEY,
Petitioner,

vs.

CITY OF CLEVELAND HEIGHTS,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE OHIO SUPREME COURT

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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ARGUMENT

The Petitioner has stated and demonstrated a valid claim under 42 U.S.C. §1983. The Petitioner all along has attacked the Respondent city's established procedure under which he was denied his promotion as being invalid and thus instrumental in denying him

the constitutional due process which would have been afforded him under the Ohio state civil service statutes. Therefore, the Petitioner has claimed that it is the procedure, itself, which is defective, not the failure of city officials to act pursuant to a valid city procedure. By not taking notice of this fact, both the Respondent and the Ohio Supreme Court have made a mistake in their reasoning that has led to this incorrect decision.

The established procedure of the Respondent is of no legal effect. While it is true that the Ohio Supreme Court never reached this issue in its decision, the validity of the rule has already been decided by the court. The Ohio Supreme Court in *State, ex rel. Habe v. South Euclid*, 56 Ohio St. 3d 117 (1990), unanimously held a nearly identical rule under identical circumstances to be invalid. *Habe*, a *per curiam* decision, is exactly on point and unless the doctrine of *stare decisis* is no longer viable, which is not the case, it can be conclusively stated that the Respondent's rule—the established procedure—is invalid and state statute is the applicable standard. *Id.* Since the Petitioner is claiming that the established procedure, itself, not the manner in which it was applied, operated to cause the deprivation, adequacy of state post-deprivation procedure is irrelevant.

An excellent example of when the availability of adequate state post-deprivation procedure is irrelevant is when a procedural due process claim is founded upon a flawed established procedure, as in *Spruytte v. Walters*, 753 F.2d 498 (6th Cir. 1985); *cert. denied*, 474 U.S. 1054 (1985). Spruytte, an inmate, alleged that the prison officials had refused to give a paperback dictionary mailed to him by his mother. Prison officials claimed, however, that they properly withheld the dictionary pursuant to Department of Correction directive. The

Department's directive was in direct conflict with a state Administrative Rule. The Administrative Rule was held to take precedence and, therefore, the directive had no legal effect. *Id.* at 506.

The proper analysis for determining whether a state law creates a protected property interest parallels the analysis for determining whether a state law creates a liberty interest. (See Petition for Writ of Certiorari, pp. 10-12.) The court in *Spruytte* applied the same analysis and held that "the [Administrative] Rule creates a federally protected interest." *Spruytte*, 753 F.2d at 508. The court distinguished *Parratt v. Taylor*, 451 U.S. 527 (1981), *Hudson v. Palmer*, 468 U.S. 517 (1984), and their progeny and concluded that:

> "The deprivation of Spruytte's protected property interest was 'caused by conduct pursuant to established state procedures.' . . . Thus, the adequacy of state post-deprivation procedure is irrelevant." *Spruytte v. Walters*, 753 F.2d at 510 (citation omitted).

As in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1981) it is the established procedure, itself, that destroys the Petitioner's property interest without granting him proper procedural safeguards that are incorporated into the state statutes. Further, the Respondent is on notice that its rule conflicts with state law. Therefore, the decisions in *Spruytte* and *Logan* are completely analogous to the instant case.

Respondent, in its brief, places great reliance on the case of *Buclary v. Borough of North Hampton*, 1991 U.S. Dist. Lexis 9897 (Case No. 90-7950) (E.D. Pa. 1991) (Unreported) (Respondent's Appendix, pp. A2-A29). However, *Buclary* is easily distinguished. The plaintiffs in *Buclary* contended that the officials failed to act

pursuant to the established procedures. They, however, were not attacking the procedure, itself, as being deficient or the root cause of the deprivation, as is true in the instant case. This is where both the Respondent and the Ohio Supreme Court have failed in their analysis.

Thus, clearly, Petitioner's claim of a constitutionally protected property interest is well supported. Moreover, since the deprivation of Petitioner's property interest was caused by an invalid established procedure (as in *Habe*), the Ohio Supreme Court's failure to distinguish that procedure from state statute is clearly erroneous.

The Respondent, obviously, believes Petitioner Shirokey was not qualified for a promotion although he stood fourth on the eligible list. With this in mind the Respondent denied him a promotion by using its rule, without giving the Petitioner notice and a hearing in which to refute or rebut this negative opinion. The Respondent asks, in its brief, what process could have prevented an erroneous decision. Had the Respondent used the proper state statutes, the Petitioner would have been promoted in the normal course and served his probationary period. If, at the end, his performance was satisfactory, then the promotion would have been made permanent. If, however, his performance was unsatisfactory, then he would receive *notice* of his deficiencies and a rudimentary *hearing* before the demotion so as to have an opportunity to refute or rebut the charge that his performance was unsatisfactory—this is the Due Process and Predeprivation Procedure required. The Respondent, however, aborted this process by preventing Shirokey's name from being certified and thereby never promoting the Petitioner. The Respondent now argues that since it never promoted the Petitioner, he is not entitled to use, nor did it violate, the due process guarantees owing under the state statutes.

The Respondent attempts to justify the validity of its rule by relying on *State, ex rel. Firefighters v. East Cleveland*, 40 Ohio St. 3d 222, 533 N.E.2d 282 (1988). *East Cleveland* is easily distinguished from *Habe* and the instant case. The civil service rule that was the central issue in *Habe* is almost identical to the rule at issue in this case. On the contrary, the ordinance in *East Cleveland* did not address the issue of which person should be appointed; rather, it addressed whether the mayor was required to completely fill the vacancies to the level of the authorized complement in any particular job class. The ordinance was not in direct conflict with the state statutes since the state statutes did not expressly address this contingency—that all vacancies shall be filled to the total authorized complement. Moreover, in *Habe*, as in the case at bar, the regulation at issue was not an ordinance, but rather a civil service commission rule. The Respondent neglects to discuss *Habe*, which is directly on point; rather, it relies upon *East Cleveland* which can be distinguished.

The Respondent's argument that neither a promotional employee nor a probationary employee has a constitutionally protected property interest is a generalization. As seen above, whether a state law creates a protected property interest depends solely upon the nature of the substance of that particular law. The cases which the Respondent cites in its brief (Respondent's Brief in Opposition, p. 8, fn. 2) are founded upon state laws which can be distinguished from Ohio Revised Code §§124.45 through 124.49. (Petitioner's Appendix, pp. A50 through A57.) Moreover, it should be noted that the court in *Buclary*, upon which the Respondent relies in its brief, likewise concluded that the plaintiffs "by virtue of the inclusion on the certified

list, have a 'property interest' in the appointments." (Respondent's Appendix, A12.) Other jurisdictions, after proper analysis of the state law involved, have concluded that a promotion and probationary employees do have protected property interests. *See, Marvin v. King,* 734 F. Supp. 346 (S.D. Ind. 1990).

An excellent example of the chilling effect of the precedent set forth by this decision of the Ohio Supreme Court is the assertion by the Respondent that City of Cleveland Heights Codified Ordinance §137.11 is valid as it pertains to firefighters. This ordinance is not expressed in the charter and is in direct conflict with Ohio Revised Code §124.49. (Petitioner's Writ of Certiorari Appendix, page A57.) This ordinance expressly denies a firefighter the constitutional procedural due process guarantee that is set forth in the state civil service statute, O.R.C. §124.49. *Id.* However, according to the Respondent, the "Petitioner . . . could be demoted at anytime without right of appeal." (Respondent's Brief, p. 8, fn. 2.)

A logical extension of Respondent's argument, bolstered by this decision of the Ohio Supreme Court, would be that a city, without fear of liability under 42 U.S.C. §1983, could adopt a rule that conflicts with Ohio Revised Code §124.34 (See Petitioner's Appendix, page A47), and fire any employee of the classified service without notice or hearing, thereby denying that employee his constitutionally protected property interest and right of pre-deprivation notice and hearing. O.R.C. §124.34 is the same statute scrutinized by this Court in *Cleveland Board of Education v. Loudermill,* 470 U.S. 532 (1985).

The Respondent, under the guise of "home rule," has enacted invalid civil service commission rules that deny their firefighters' constitutionally protected property interests—the right to pre-deprivation notice and hearing and an appeal process—which were created by the state legislature. These rules, under identical circumstances, have been held to be invalid. *Habe*, 56 Ohio St. 3d 117 (1990).

CONCLUSION

As demonstrated, the Petitioner's interest in his promotion as a firefighter rises to the level of a property interest protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Thus, this case involves more than state issues. Furthermore, when the deprivation of a constitutionally protected property interest is caused by conduct pursuant to an established city procedure, that is illegal, and when it is that procedure that is at issue, the adequacy of state post-deprivation procedures is irrelevant. *Spruytte*, 753 F.2d at 510. The Petitioner, thus, has properly stated a valid claim under 42 U.S.C. §1983. Therefore, it is respectfully urged that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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